

Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) decision dated August 3, 2023 (the Decision) denying the Appellant persons with disabilities (PWD) designation.

The Ministry found that the Appellant met the age (over 18) and duration (impairment to last 2 years) requirements.

However, the Ministry found:

- The Appellant did not have a severe physical or mental impairment;
- The Appellant's daily living activities aren't directly and significantly restricted; and,
- The Appellant doesn't need the significant help to do daily living activities because of significant restrictions.

The Ministry found the Appellant was not one of the prescribed classes of persons eligible for PWD on alternative grounds. As there was no information or argument on this point, the Panel considers it not to be an issue in this appeal.

Part D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (the Act), section 2

Employment and Assistance for Persons with Disabilities Regulation (the Regulation), section 2

Employment and Assistance Act, section 22(4)

The legislation is in the Appendix at the end of this decision.

Part E – Summary of Facts

The information the Ministry had at the time of the Decision included:

- The Medical Report, dated March 17, 2023 completed by the Appellant’s Doctor (the Doctor);
- The Assessor Report, dated April 3, 2023, also completed by the Doctor;
- The Self Report, dated February 23, 2023, completed by the Appellant;
- The Appellant’s request for reconsideration, dated August 7, 2023 (the Reconsideration Request), which explains why he wanted the Ministry to reconsider its original decision;
- An undated scanned copy of a photograph of the Appellant’s torso showing liver transplant scars with the caption “75 staples, 35 cm liver transplant”;
- A one-page letter, dated July 14, 2023, addressed “*To whom it may concern*” and co-signed by a medical practitioner and a social worker at an organ transplant program at a hospital in the Appellant’s community (the July 14 Letter). The July 14 Letter says:
 - The Appellant received a liver transplant on June 4, 2023;
 - The Medical practitioner and social worker support the Appellant’s PWD application, and that they understand the Appellant’s “*income is limited and (he is) currently impaired from obtaining work due to (his) recent liver transplant*”;
 - Due to complications from a liver-related diagnosis in June 2022, the transplant was required due to “*the significant impact his symptoms had on his day to day functioning, which are physical, mental, and emotional in nature, preventing him from working.*”;
 - Following discharge from the hospital post-transplant, the Appellant attends an organ transplant clinic for ongoing medical follow-up, and will continue to do so “*for the foreseeable future*”. Typically, these appointments take place twice a week for three hours for the first three months post-transplant, are considered lifesaving treatment and cannot be missed, and will occur less frequently as the Appellant’s health improves; and,
 - The Appellant “*will be followed in the (organ transplant clinic) and (receive) specialist care in relation to (his) liver transplant for the rest of his life at intervals set by his health care providers.*”
- An undated, edited version of two pages of the Assessor Report (the Second Self Report). The Second Self Report was made by the Appellant and has a note

attached which says *"Corrected info below, as stated Doctor submitted after phone interview 10 mins."*;

- A one-page consent form, signed by the Appellant on June 1, 2023, and a support person (the Support Person), also signed on June 1, 2023 (the Support Agreement). The Support Agreement identifies a number of reasons why the Appellant is required to have the Support Person assist him during the period following his liver transplant;
- A one-page *"Patient Medical Adherence Agreement"*, signed by the Appellant on June 1, 2023 (the Adherence Agreement), in which the Appellant agrees to *"do everything to ensure a successful outcome to transplantation"*, including: taking medications as prescribed, completing bloodwork and other medical tests as required, adhere to all components of his care, avoid alcohol, cigarettes and recreational drugs, comply with hospital admissions and emergency room visits as advised by medical professionals, and discuss any side-effects or any sudden symptoms with clinic staff. The Appellant has attached a handwritten note to the Adherence Agreement that reads *"My signed contract: To protect the massive investment made by (my community health authority) in my life! ... Expensive meds for LIFE"*); and,
- Six pages of printouts from various internet websites about liver and other organ transplant disability benefits available from the federal government in a foreign country (the Website Printouts).

Diagnoses

In the Medical Report, the Doctor says the Appellant has cirrhosis, with date of onset of June 2022.

Duration of Impairment

While the Ministry determined that the Appellant met the duration of impairment criterion, it is important to state the evidence upon which the Ministry made this finding, for reasons set out in the "Reasons for Panel Decision" section below.

In the Medical Report, in response to the question *"What is the estimated duration of the impairment and are there treatments that may resolve or minimize the impairment?"* the Doctor said *"(The Appellant) is on transplant waitlist, however duration of waitlist unknown."*

Physical Impairment

In the Medical Report, the Doctor says the Appellant's cirrhosis is *"Currently compensated, however with chronic disability fatigue"*.

The Doctor says the Appellant:

- Can walk four or more blocks on a flat surface without help;
- Can climb more than five steps; and
- Has no limitations to the length of time he can remain seated.

The Doctor also says that the Appellant has *"issue(s) with any repeated exertion no matter (what) weight (is) lifted"*.

In the Assessor Report, the Doctor says the Appellant is independent with walking indoors and outdoors, climbing stairs and standing, but needs periodic assistance from another person with lifting, and carrying and holding.

In the Self Report the Appellant says he has severe liver disease, and as a result he suffers from fatigue. He says that as a result he has stopped working and is living with his mother. He also says it is unknown if or when he will receive a liver transplant.

In the Reconsideration Request, the Appellant says he doesn't understand why his PWD designation application was rejected, adding *"My Doctor and I have perhaps made too many assumptions regarding the Ministry's understanding ... I cannot reconcile the rejection with what the Ministry has been told by (the Doctor) ... I do not blame (the Doctor), 10 minutes over the phone should be enough."* The Appellant also says that he is now post-transplant, and the *"chronic disability fatigue"* he experienced prior to his liver transplant is now ten times worse. He says he can't do anything at this point, due to *"severe pain, low blood pressure, light headedness, fatigue ... etc."*

Mental Impairment

In the Medical Report, the Doctor says the Appellant has no significant deficits with his cognitive and emotional function.

In the section of the Assessor Report that is to be completed if a PWD designation applicant has an identified mental impairment, the Doctor written *"N/A"* and not completed that section of the form. The Doctor says the Appellant's writing, speaking, reading, and hearing abilities are good and that he is independent in all aspects of social functioning.

The Appellant does not identify any mental impairments in the Self Report.

In the Reconsideration Request, the Appellant says that the drugs he is taking since his liver transplant give him *"brain foginess"* and make him irritable.

Restrictions in the Ability to Perform Daily Living Activities

In the Medical Report, the Doctor says the Appellant has not been prescribed any medications that interfere with his ability to do daily living activities. The Doctors says that the Appellant requires periodic assistance with the daily living activities of performing

housework, shopping for personal needs, moving about outdoors, and use of transportation facilities, adding the comment *"(The Appellant) may initiate (an) activity, however more difficult to do more than one activity per day. Finds it difficult to complete activity."* The Doctor also says the Appellant *"is at chronic risk of decompensation of cirrhosis which can actually lead to hospitalization and inability to perform daily living activities."*

In the Assessor Report, the Doctor provides an assessment of the Appellant's abilities to do daily living activities before he received the liver transplant and says fatigue is decreasing the rate at which the Appellant can do daily living activities.

In the Second Self Report, the Appellant provides an edited version of the parts of the Assessor Report that list the daily living activities for which he requires assistance after the transplant. Specifically, the Appellant says he requires periodic assistance from another person for doing housework and getting in or out of bed, a chair or a vehicle. He also says he need continuous assistance with preparing meals and shopping.

In the Reconsideration Request, the Appellant says his abilities to do daily living activities are *"worse now ... no activities can be done"*. He says he never saw a completed copy of the Assessor Report, adding it was *"filled out over the phone and faxed by (the Doctor) to the Ministry. Some info is incorrect, and comments lack detail."* The Appellant also writes with regard to his ability to do specific daily living activities as reported in the Assessor Report, *"It says I am independent. I am not. Was not. I could, as mentioned, manage some of these independently but not all and not in 1 day ... No additional comments unfortunately."* and *"I can't do anything without pain, feeling faint or unfocussed due to drugs ... post transplant, paying rent and bills, no chance ..."*

In the July 14 Letter, the medical practitioner and social worker say that the Appellant's liver transplant has had a physical, mental and emotional impact on his day-to-day functioning that prevents him from working.

Need for Help

In the Medical Report, which was prepared before the Appellant received a liver transplant, the Doctor says the Appellant doesn't need any assistance with daily living activities *"at the present"*, and doesn't require any prostheses or aids for his impairment..

In the Assessor Report, which was also prepared before the Appellant received a liver transplant, the Doctor says the Appellant gets help with his daily living activities from his mother but does not use any assistive devices or an assistance animal to help compensate for his impairment.

In the Reconsideration Request, the Appellant says he is *"nurse maided"* by his mother, with whom he has lived since his liver transplant. He says his mother is his caregiver,

adding that his mother *"is providing me with housing and food in addition"*. The Appellant also says *"housekeeping is done by my mother ... She pays everything, I contribute nothing"*.

In the Second Self Report, the Appellant says his 74-year-old mother does everything.

The Support Agreement says a support person must be available and present during the pre-transplant waiting period and the in-hospital postoperative stay, and must live with the Appellant after he is discharged from the hospital, for a minimum of three months.

The Support Agreement also says the support person must be available to assist with personal care, accompany the Appellant to and from treatment appointments, and assist in medication scheduling by prompting at appropriate intervals. Other responsibilities can include assisting with groceries, laundry, meal preparation, and *"other activities necessary for a safe and comfortable postoperative recovery"*.

Additional Information Submitted after Reconsideration

Section 22(4) of the *Employment and Assistance Act* says that a panel can consider evidence that is not part of the record when the Ministry made the Decision. But first the panel must decide the new information is relevant. Once a panel has determined if any new evidence can be admitted, it must decide if the Decision was reasonable considering the new evidence.

In the notice of appeal, the Appellant says *"The ministry's decision is irreconcilable given my current state both before and after the liver transplant"*.

On August 21, 2023, the Appellant provided a submission (the Appellant Submission). In addition to some information previously provided, the Appellant submission included:

- A list of the medications the Appellant is required to take each day since his liver transplant, and a photograph of the medications;
- A one-page email, dated August 1, 2023, addressed to the Appellant (the August 1 Email), and sent by a registered nurse (the Registered Nurse). The August 1 Email provides answers to several questions the Appellant has apparently posed in a previous email concerning things like travel, weight gain, and hair loss post-transplant. The Appellant has handwritten *"severe back pain"* and highlighted a section of the August 1 Email which says *"Back spasms: low impact exercises and stretches targeting your back might help. Consider seeing a physiotherapist (if) back spasms continue to occur."* The Registered Nurse also writes *"Follow-up appointment with the liver transplant MD is on Aug 10 ... If you want to further discuss these topics with the MD, you may do so during the appointment."*;

- A one-page email from the Registered Nurse, dated July 10, 2023 (the July 10 Email). The July 10 Email says, in part, that the Appellant should take his time *"when changing positions (e.g. from sitting to standing) to prevent any light-headedness."*; and,
- A one-page email from the Registered Nurse, dated June 29, 2023 (the June 29 Email). The Appellant has underlined by hand the following passages in the June 29 Email: *"This will avoid withdrawal symptoms and hopefully also help ease the drowsiness that you are experiencing",* and *"This is to investigate the cause of your persistent fatigue and low blood pressure".*

Evidence Presented at the Hearing

The Appellant was joined at the hearing by two witnesses: another person recovering from a liver transplant (the First Witness) and the Appellant's mother (the Second Witness). The Ministry also attended the hearing.

At the hearing, the First Witness said they went into surgery at about the same time as the Appellant, and that they were recently granted the PWD designation. The First Witness said they didn't understand why the Appellant wasn't designated as a PWD because *"(the Appellant) went through the same situation (as the First Witness)"*.

In response to a question directed to the First Witness by the Appellant about how they felt when they couldn't get out of bed in the first days following their transplant, the First Witness said it was very difficult and they needed help, adding *"they cut through my stomach muscles"*, and *"it gets better over time"*. In response to a question from the Panel, the First Witness said they were not directly involved in their PWD designation application process, and that the application was made by the First Witness's spouse.

In response to a question from the Panel about how long it took them to regain some mobility following the transplant, the First Witness said it was a few weeks before they could start walking again. The First Witness said it was now four months since they had the transplant, adding *"I am doing some biking now, but I can't jump or run"*. They also said they didn't know how long it would take to *"get back to normal"*, but progress was very slow. The First Witness said they had to take a break every 10 minutes when they took a walk. They also said they had a hard time bending over due to the surgery and had a lack of energy.

In response to other questions from the Panel, the First Witness said it was about six weeks following the transplant before they could get out of bed, and that *"some people say (that it would take) six to twelve months"* to get *"back to normal"* following a liver transplant. The First Witness said they wanted to get back to work because they have a family to support but did not feel comfortable going back to work yet. They also said they have a handicap parking sticker for their car.

When asked by the Panel what their current pain level was on a scale of one to ten, the First Witness said *"a two right now"* but it depends on their body's reaction to their medications. They said they are taking medications both for pain and to limit the risk of organ rejection, and that their prescriptions were automatically renewed, adding that taking prescription medication post-transplant was *"a life-long process"*. They said they see their doctor every four weeks for a check-up.

At the hearing, the Appellant said it didn't make sense to him why the Ministry found that three of the criteria required for the PWD designation weren't met. He said it was unreasonable for the Ministry to find that the three criteria weren't met both before his liver transplant and after it.

The Appellant said it was not reasonable for the Ministry to rely on the information provided in his original PWD designation application in the Decision, or to state the same reasons for denying the PWD designation in the Decision both pre-transplant and post-transplant. He said he had felt the need to provide a photograph of his scar and staples, and that he shouldn't have had to do that. He said he believed that the words *"liver transplant"* should have been sufficient to prove he qualified for the PWD designation, and referred to the Website Printouts as additional evidence of his argument that he should be considered a PWD.

The Appellant pointed out that the Doctor had said in the PWD application that the Appellant had *"debilitating fatigue"*, and that *"debilitating"* and *"disability"* have the same root meaning. He said *"it makes no sense that the Doctor says I can walk more than four blocks and climb more than five stairs"* before his liver transplant. The Appellant explained that he now needs to support himself using the banister when climbing stairs, he is currently unable to sit comfortably, and until recently he was only able to lie down. He summarized some of his current symptoms: his pain medication gives him *"brain fog"*, and he gets diarrhea and nausea from the anti-rejection medication.

The Ministry asked the Appellant why he hadn't provided the Ministry with an updated medical assessment. The Appellant said that that shouldn't be necessary because *"you have my emails, my words"* and that most of the reasons given by the Ministry in the Decision for not granting him the PWD designation were the same ones given in the Ministry's original decision.

In response to a question from the Panel, asking him to describe a typical day, the Appellant said he gets out of bed in the morning, makes coffee and breakfast, and spends most of the rest of the day sitting in a chair. He said he tries to help with chores around the house but still suffers from light-headedness. He said it's been two months and three weeks since his transplant.

In response to a question from the Panel regarding the Second Self-Assessment, the Appellant said the reason he had indicated the need for continuous assistance for activities like banking, budgeting, and paying rent and bills was that he was not working and therefore had no money.

Noting a comment made by the Registered Nurse in the August 1 Email advising the Appellant not to travel for the time-being, the Panel asked the Appellant if he had any future travel plans. The Appellant said he would like to make some specific travel plans. He said he was feeling a bit better now but doesn't know when he'll be able to travel. In response to another question from the Panel about how long he had been told it would take for him to "*get back to normal*", the Appellant said "*one year is the textbook answer*", but each case was different.

In response to other questions from the Panel, the Appellant said he didn't know he was permitted to submit a new PWD designation application post-transplant and that he had not applied for a Canada Pension Plan disability pension.

The Second Witness, who had not previously participated in the hearing, joined to provide additional testimony. The Second Witness said the Appellant was diagnosed with cirrhosis fifteen months ago and at the time they had no idea how sick he was. If they had known, they would have applied for the PWD designation sooner. The Appellant was working part-time at the time, and if he went to work for four hours in the morning he would have to come home and sleep all afternoon. The Second Witness said that they looked at the PWD designation criteria on the Ministry website and were convinced that the requirements were met.

Describing the Appellant's current condition, the Second Witness said he can dress himself but sits in a chair for most of the day watching television and using his computer. When it gets to the point where he can't sit anymore, he lies down. He also suffers from diarrhea and nausea. A month after his surgery the Appellant started walking for ten minutes at a time, a couple of days per week. He can only walk for ten minutes at a time due to fatigue.

The Second Witness said that they were the designated caregiver, as described in the Support Agreement, and when they met with the social worker the social worker wanted it made clear that the support requirements were 24/7. The Second Witness said that thirty percent of transplant recipients have "*some form of rejection*", and the health authorities want to limit the possibility that a second transplant might be required. In response to a question from the Panel the Second Witness said there had been no discussions with the hospital about whether it might be necessary to have the Support Agreement renewed after the first three-month period.

Regarding the Appellant's current need for help with daily living activities, the Second Witness said that they do all the grocery shopping, prepare all the meals, and do all the

housework. The Appellant said that on one occasion when he was out with the Second Witness, he pulled a muscle and "*popped a stitch*" getting out of the car.

At the hearing, the Ministry provided the reasons for the Decision by summarizing the information in it. The Ministry said that it must rely on the information in the application forms and does not consider information from other sources on the internet. The Ministry stressed that the PWD designation is not "*driven*" by a diagnosis; what's important is the impact of an impairment on daily living activities.

The Ministry also said that the Appellant hasn't provided any updated evidence from prescribed professionals and there is nothing to indicate the Doctor agrees with the Appellant's Second Self Report, adding that the information might not be accurate.

Regarding the information in the July 14 Letter about the impact of the liver transplant on the Appellant's ability to work, the Ministry said the PWD designation "*is not work driven*", as it is based on the applicant's ability to do daily living activities, which do not include an ability to work. Regarding the daily living activities as described in the *Act* and the Regulation, the Ministry said the Appellant had not provided any information on "*the expected duration of impacts*" now that he has had a liver transplant, and that none of the documents in the Appellant Submission "*address functionality and impact on daily living activities*".

In response to question from the Panel, the Ministry said that there was nothing in the Appellant's file to indicate that the Ministry had contacted the Doctor to clarify any issues or to see if the Appellant's daily living activity impacts would change following his liver transplant. The Ministry said that "*typically (it) does not reach out*" to the prescribed professionals under these circumstances, and that the Appellant "*is required to*" get any new information on the impact if a liver transplant on the criteria set out in the legislation. The Ministry also said it will contact prescribed professionals for answers when the Ministry needs clarification on something, but that "*they didn't see anything here*".

When asked by the Panel if the Ministry relied on tick marks in assessing the Medical Report and the Assessor Report, the Ministry said no, it takes the entire application into account.

In response to another question from the Panel about the requirement that a severe impairment last at least two years, the Ministry said it did not routinely review a PWD recipient's eligibility every two years, and that the designation was effectively for life.

Admissibility of New Evidence

There is no new evidence in the notice of appeal.

New evidence in the August 1 Email is the information about the Appellant's desire to travel when he is well enough to do so and information about problems the Appellant was

experiencing with his health after his liver transplant. The Appellant Submission also includes advice from the Registered Nurse. This new evidence is admitted by the Panel because it's relevant to the appeal.

The following new information was provided by the Appellant and his witnesses at the hearing:

- The First Witness's testimony about their experiences following their liver transplant, and that they have applied for and received the PWD designation since the transplant operation;
- The Second Witness's testimony about the help they provide the Appellant with his daily living activities and that there has been no indication that the health authority wants to have the Support Agreement renewed beyond the three-month post hospital discharge period; and,
- Information from the Appellant about his current daily routine, need for help with daily living activities, and degree of mobility.

The Panel admits all the new information presented by the witnesses and the Appellant at the hearing, except for the information provided by the First Witness regarding his successful application for the PWD designation.

The Panel does not admit the information about the First Witness's successful application for the PWD designation because no evidence was presented to confirm the applicant was granted the PWD designation. In addition, no evidence was presented to allow comparison to of the First Witness's impairments with the information in the Appellant's PWD application.

The Ministry did not object to the Panel considering any of the new evidence.

Part F – Reasons for Panel Decision

The issue in the appeal is whether the Decision was reasonable based on all the evidence or whether the legislation was reasonably applied in this case. In other words, was it reasonable for the Ministry to determine that:

- The Appellant doesn't have a severe mental or physical impairment, but his impairment was likely to continue for at least two years;
- The Appellant's daily living activities aren't directly and significantly restricted either continuously or periodically for extended periods due to the severe impairment; and,
- It couldn't be determined that the Appellant needs help to do daily living activities because of significant restrictions.

ANALYSIS

In determining PWD eligibility, the Ministry must consider all relevant evidence, which includes the Appellant's evidence. That said, the legislation requires the Ministry to make its decision based largely on the opinions of prescribed professionals, which includes a medical doctor.

On assessing a PWD designation application, the Ministry's practice is to separate the designation requirements, which are set on in section 2 of the *Act*, into five discrete components or criteria. However, those requirements must be read in their entire context, harmoniously with the scheme and the objectives of the *Act*.

Section 2 of the *Act* says that a medical practitioner or nurse practitioner must indicate that they think the applicants impairment is severe and that it is likely to continue for at least two years. In addition, a "prescribed professional", who could be a medical practitioner, a nurse practitioner or any of a number of other professionals listed in the definition of the term, must indicate that the applicant's ability to do daily living activities is significantly restricted and that help is needed with daily living activities as a result of the severe impairment. .

Duration

In the Medical Report, the Doctor said the Appellant was on a transplant wait list, and the length of time he would remain on a waitlist was not known. After the Medical Report was signed by the Doctor, the Appellant received a liver transplant.

The Panel notes that the Doctor's assessment of the duration of the Appellant's physical impairment does not indicate how long the impairment is likely to last. The Doctor's assessment of the other criteria set out in the legislation is based on the impact of the

Appellant's physical impairment before the liver transplant. The Doctor's comment on duration suggests that the duration might be affected by a transplant but does not say what the effect is likely to be.

At the hearing, the Ministry said it will usually contact a prescribed professional when it needs clarification on something in a PWD application report, but that it didn't see the need to do so here. The Ministry took the Doctor's comments on duration to be unambiguous, and accepted the Doctor's comment on duration as an indication that the impairment was likely to continue for at least two years. This despite knowing when it made its Decision that the Appellant had since received a liver transplant, that the Doctor had suggested a transplant might affect duration in some unspecified way, and that the Doctor had not said what the effect of a transplant on duration was likely to be.

In the July 14 Letter, the medical practitioner, who is a prescribed professional, says that Appellant will require ongoing medical follow-up *"for the foreseeable future"*, and that the Appellant will receive specialist care at intervals set by his health care providers for the rest of his life. The medical practitioner does not indicate why the life-long specialist care is required, but does say that the medical follow-up appointments will occur less frequently *"as (the Appellant's) health improves"*.

In the August 1 Email, the Registered Nurse, who is a prescribed professional, says that travel is not recommended *"within the first year of receiving (a) transplant"*.

The Support Agreement says the Appellant needs a support person at all times for at least three months following his discharge from hospital. At the hearing, the Second Witness, who is the designated support person, said there had been no indication whether it might be necessary to have the Support Agreement renewed after three months.

At the hearing, the First Witness and the Appellant both said that their health had improved since they had their respective liver transplants, in the First Witness's case about four months ago and between two and three months ago in the case of the Appellant.

The Panel finds that the answer to the question of duration of the impairment post-transplant cannot be reasonably determined based on all the available evidence. Therefore, the Panel finds that the Ministry did not reasonably determine that the Appellant's impairment was likely to last for at least two years post-transplant, as required under section 2 of the Act.

Severity of Impairment

Physical Functioning

The Appellant's Position

The Appellant's position is that he doesn't understand why his PWD designation application was rejected, particularly now that he has had a liver transplant, because and his fatigue is now worse than it was before the transplant, he has to sit in a chair for much of the day and he can't climb stairs without support. He feels that an updated medical assessment shouldn't be necessary.

The Ministry's Position

The Ministry's position is that, while acknowledging that the Appellant has recently had major surgery, a clear picture of the expected nature and duration of the surgery's impacts to his physical functioning is difficult to establish based on the information provided.

Panel Decision

Regarding severity, the Support Agreement describes liver transplantation as "*a complex medical procedure that requires the recipient to engage in numerous health care behaviours to help insure a successful outcome to transplantation*". The Adherence Agreement says that it is essential for the Appellant to have "*a collaborative health relationship ... with the doctors managing your ... health*".

The Panel assigns no weight the Appellant's argument that the Ministry should have determined that he had a severe impairment because the Website Printouts indicate that an organ transplant recipient in a foreign country might qualify for that country's federal disability programs. The Panel notes that the Ministry must be guided by the requirements of BC legislation, in this case the *Act* and the *Regulation*.

The word "*Impairment*" is not defined in the legislation. Impairment is defined in the Medical Report and the Assessor Report as "*a loss or abnormality of psychological, anatomical, or physiological structure or function causing a restriction in the ability to function independently, appropriately or for a reasonable duration*". Any health condition that involves a loss of functioning of a vital organ must reasonably be considered a physical impairment. The question is: is it a severe impairment?

The Panel finds that any impairment that requires the replacement of a vital organ and is subject to the risks identified in the Support Agreement and the Adherence Agreement can only be reasonably considered a severe impairment. Accordingly, the Panel finds the

Ministry's determination that the Appellant's physical impairment was not severe was not reasonable.

Mental Functioning

The Appellant's Position

The Appellant has not argued that he has a severe mental impairment.

The Ministry's Position

Based on the assessments provided by the Doctor and contained in all other relevant documents, the Ministry's position is that a severe impairment of the Appellant's mental functioning has not been established.

Panel Decision

The Doctor has not diagnosed a mental impairment. Apart from "brain fog" and irritability from his medications, the Appellant does not indicate that he feels he has any type of mental impairment. The Panel notes that there is no available evidence to suggest that the Appellant has any mental impairments, regardless of severity, other than those that are the result of taking medication for the Appellant's physical impairments.

The Panel finds that the Ministry reasonably determined that the Appellant does not have a severe mental impairment.

Restrictions in the Ability to Perform Daily Living Activities

Regarding restrictions to doing daily living activities, the legislation says the Ministry must be satisfied that any severe impairment, whether physical or mental, will directly and significantly restrict someone's ability to do their daily living activities either continuously or periodically for extended periods.

The Appellant's Position

The Appellant's position is that he is unable to do many daily living activities, in particular since his liver transplant. Specifically, he is unable to do any housework, prepare any meals, or shop for personal needs. In addition, he needs assistance getting in and out of bed, a chair, or a vehicle. The Medical Report indicates that he has difficulty doing multiple daily living activities in a day and believes that that, in itself, should be sufficient.

The Ministry's Position

The Ministry's position is that, while the Appellant has recently had major surgery, it is difficult to establish a clear picture of the expected duration or nature of impacts to his daily living activities following recovery from surgery based on the information provided.

Panel Decision

After assessing the severity of an impairment, the Ministry must consider how long a severe impairment is likely to last, how much the applicant's ability to do daily living activities is restricted, and if they need help with those activities.

The Panel notes that the evidence shows that there has been a significant impact on the Appellant's ability to do daily activities since his liver transplant. Clearly there is little value in focussing on the Doctor's assessments of the Appellant's daily living activity abilities in the Assessor Report, as those assessments were made before his liver transplant. However, section 2 of the *Act* requires that an assessment of an applicant's abilities in performing daily activities be done by a prescribed professional.

Evidence in the Second Self Assessment and from the Second Witness at the hearing indicates continuous and periodic restrictions in the Appellant's ability to perform several daily living activities. However, the Panel notes that no evidence has been provided to show that a *prescribed professional* has confirmed that any of the Appellant's daily living activities are significantly restricted, continuously or periodically for extended periods, *since the Appellant's liver transplant*.

Based on all the available evidence, the Panel finds that the Ministry reasonably determined that there was not sufficient evidence from a prescribed professional to confirm that the Appellant's daily living activities were significantly restricted continuously or periodically for extended periods.

Help with Daily Living Activities

The Appellant's Position

The Appellant's position is that he has been living with his mother since his liver transplant as required in the Support Agreement. He must now rely on his mother to help him get in and out of the bed, chairs, and a car, and to do all the housework, cooking, and shopping.

The Ministry's Position

The Ministry's position is that it cannot be determined that significant help is required because it has not been established that the Appellant's daily living activities are significantly restricted.

Panel Decision

The legislation says that the Ministry must be satisfied that a person needs help to do daily living activities *as a result of direct and significant restrictions in their ability to perform daily living activities*. So direct and significant daily living activities restrictions must be the cause of the need for help.

Help in relation to a daily living activity is defined in the legislation as the need for:

- An assistive device;
- The significant help or supervision of another person; or,
- The services of an assistance animal.

Regarding his abilities post-transplant, both the Appellant and the Second Witness have said that the Appellant's mother is required to help with many of the Appellant's daily living activities. In addition, the Support Agreement says, "*Other responsibilities can include providing assistance with groceries, laundry, meal preparation and other activities ...*". Based on the available evidence, it's clear that the Appellant requires care for a period of time following his liver transplant. However, because the expected duration of the Appellant's recovery is not known, and because a prescribed professional has not provided sufficient detail on the nature, frequency and duration of his daily living activity restrictions, the Panel finds that the Ministry reasonably determined that it has not been demonstrated that significant help will be required for at least two years.

Conclusion

In summary, based on all the evidence and legislation, the Panel finds that the Ministry was not reasonable in determining that the duration of impairment criteria had been met, given the changing circumstances. The Ministry was also not reasonable in finding that the Appellant did not have a severe impairment. However, the decision that there is insufficient information from a prescribed professional to determine the effect of the Appellant's impairment on his daily living activities and need for help was reasonably supported by the evidence.

The Panel therefore confirms the Decision, and the Appellant's appeal is not successful.

APPENDIX – RELEVANT LEGISLATION

The criteria for being designated as a PWD are set out in Section 2 of the Act as follows:

Persons with disabilities

2 (1) In this section:

"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a

severe mental or physical impairment, the person is unable to perform;

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person is in a prescribed class of persons or that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

The Regulation provides as follows:

Definitions for Act

2 (1) For the purposes of the Act and this regulation, "**daily living activities**",

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following

activities:

(i) prepare own meals;

(ii) manage personal finances;

(iii) shop for personal needs;

(iv) use public or personal transportation facilities;

(v) perform housework to maintain the person's place of residence in acceptable sanitary condition;

(vi) move about indoors and outdoors;

(vii) perform personal hygiene and self care;

(viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

(i) make decisions about personal activities, care or finances;

(ii) relate to, communicate or interact with others effectively.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is

(a) authorized under an enactment to practise the profession of

(i) medical practitioner,

(ii) registered psychologist,

(iii) registered nurse or registered psychiatric nurse,

(iv) occupational therapist,

(v) physical therapist,

(vi) social worker,

(vii) chiropractor, or

(viii) nurse practitioner ...

The *Employment and Assistance Act* provides as follows:

Panels of the tribunal to conduct appeals

22(4) A panel may consider evidence that is not part of the record as the panel considers is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

APPEAL NUMBER 2023-0240

Part G - Order

The panel decision is: (Check one) Unanimous By Majority

The Panel Confirms the Ministry Decision Rescinds the Ministry Decision

If the ministry decision is rescinded, is the panel decision referred back to the Minister for a decision as to amount? Yes No

Legislative Authority for the Decision:

Employment and Assistance Act

Section 24(1)(a) or Section 24(1)(b)

Section 24(2)(a) or Section 24(2)(b)

Part H - Signatures

Print Name

Simon Clews

Signature of Chair

Date (Year/Month/Day)

2023/09/04

Print Name

Wesley Nelson

Signature of Member

Date (Year/Month/Day)

2023/09/04

Print Name

Kenneth Smith

Signature of Member

Date (Year/Month/Day)

2023/09/04